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No. 84-2002

IN THE SUPREME COURT OF THE UNITED STATES

RONALD A. BRUNER,

PETITIONER,

V.

ALICE J. PARKER,

RESPONDENT,

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUMMARY OF ARGUMENT

The Supreme Court does not have jurisdiction because the Missouri Supreme Court did not decide the constitutional issue attempted to be raised by Petitioner. The Missouri Court did not rule the issue because it had not been properly raised and preserved as required by long standing Missouri practice.

The common law action for seduction is not unconstitutional gender based classification because it does not favor solely women and there is no Missouri decision denying this common law remedy for men. Further, if the action were maintainable only by women, it not unconstitutional because it has a fair and substantial relationship to Missouri's interest in protecting previously chaste women and the prevention of illegitimate births induced by fraudulent representations and false promises of men seeking their sexual gratifications.

ARGUMENT

I

THE SUPREME COURT DOES NOT HAVE JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 USC 1257. Before jurisdiction may be invoked under 28 USC 1257, the constitutional issue must be raised and decided by the State's highest court, in this case, the Missouri Supreme Court. Neither the Supreme Court of Missouri nor the Missouri Court of Appeals decided the constitutional issue attempted to be raised in this Court. The Missouri Court of Appeals held that the constitutional issue had not been raised as required by Missouri State practice, the Court stated,

> "To raise and preserve a federal or state constitutional question for appellate review, it must be raised at the first available opportunity. State v. Tatum, 653 S.W.2d 241, 243 (Mo. App. 1983); Kansas City v. Howe, 416 S.W.2d 683, 686 (Mo. App. 1967). It is obvious that this contention could have been raised earlier by a motion directed at the petition and during the trial. As this point was not preserved for review, it is denied. (App. 18).

Upon the dissent of a single Judge of the Missouri Court of Appeals, the case was transferred to the Supreme Court of Missouri on the ground of a conflict

with a prior State decision. The Supreme Court of Missouri, without ruling on the merits of the case, simply retransferred the case back to the Missouri Court of Appeals on the ground,

> "The opinion of the Court of Appeals is not contrary to any previous decision of another appellate court of this State and we are not obliged to retain this cause." (App. 5)

Neither the Missouri Court of Appeals nor the Supreme Court ruled on the constitutional issue attempted to be raised by the petitioner. This case is very similar to Hartford L. Ins. Co. v. Johnson, 249 US 490, 39 S Ct 336, 63 L Ed 722, in which this Court declined to review a federal question because it was not properly raised and ruled on in the trial court as required by the loan standing Missouri practice. In construing the statute this Court stated,

> "It is the settled law that this provision means that the claim must be asserted at the proper time and in the proper manner by pleading, motion, or other appropriate action under the state system of pleading and practice . . . and upon the question whether or not such a claim has been so asserted, the decision of the state court is binding upon this court when it is clear, as it is in this case, that such decision is not rendered in a spirit of evasion, for the purpose of defeating the claim of Federal right."

As the Opinion of the Missouri Court of Appeals indicates, the Federal claim was not asserted as required by Missouri's long standing practice. See also, Layton v. Missouri, 187 US 356, 23 S Ct 137, 47 L Ed 214, holding that a claimed violation of the Federal Constitution is not reviewable in this Court where the Missouri State Court declined to pass on the Federal question because it was not raised in the trial court as required by State practice. This case is entirely different than Harlin v. Missouri, 439 US 459, 99 S Ct 709, 58 L Ed 2d 733, in which the Missouri Supreme Court reviewed the constitutional issue under Missouri's, "plain error" rule. In this case, neither the Missouri Court of Appeals nor the Missouri Supreme Court ruled on the Federal claim being asserted by petitioner. The rule that the State's highest Court must pass upon the Federal question before this Court has jurisdiction to review it was recently applied in Exxon Corp. v. Eagerton, US 103 S Ct 76 L Ed 2d 497 (1983)

ARGUMENT

II

THE COMMON LAW ACTIONS FOR SEDUCTION IS NOT UNCONSTITUTIONAL GENDER BASED CLASSIFICATION.

Petitioner's argument proceeds on the assumption that only women may maintain actions for seduction. While the elements of the action of seduction make it more susceptible to use by women, Petitioner has cited no Missouri case which denies a man the right to maintain such an action. If a man can prove, and, indeed, a jury believe, that he surrendered his chastity to a woman through false promises, artifices, and deceit and was damaged, then we are confident that the common-law of Missouri would allow him to recover. If Petitioner had been defrauded and surrendered his chastity to Respondent through her artifices, false promises and fraud resulting in damage, then he could and should have filed a counterclaim.

Even assuming there is a common-law rule which prohibits a man from maintaining this action, such distinction is not unconstitutional sex classification for the reason that Missouri has a legitimate and compelling interest in ensuring that chaste

females do not surrender their chastity to aggressive men who use false promises, artifices and fraud to seduce their victims and risk subsequent pregnancy. There is an obvious difference between the consequences of sexual intercourse on men and women. Even in our modern society there are still important social values associated with chastity and the prevention of illegitimate births resulting from the fraud, artifices and false promises by men. It is the woman who bears the burden of child bearing resulting from the sexual act, not the man. There is little, if any, burden or adverse effects suffered by a man after an act of sexual intercourse, nor is the concept of male chastity as important as female chastity.

There is an obvious valid and rationale basis and legitimate state concern in requiring fathers to support illegitimate children and seducers, who use false promises, artifices and fraud in order to accomplish their sexual gratifications with chaste women, to be held legally accountable. Hopefully, we have not reached the point where states must allow chaste women to be fair game for unscrupulous

men who use their position, lies and misrepresentations in order to satisfy their lust without any legal responsibility for their misconduct.

Gender based classifications are constitutional if they realistically reflect that the sexes are not always similarly situated. As this Court said in Michael M. v. Sonoma County Superior Court, 450 US 464, 67 L Ed 2d 437, 101 S Ct 1200,

> " * * * this Court has consistently upheld statutes where the gender classification is not individious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances * * *."

This Court then upheld as constitutional a statute making it a crime to have sexual intercourse with a female under the age of 18 years of age and denied the challenge that the statute was gender based classification in that only men could be criminally liable under the statute. The opinion recognizes, "a gender based classification will be upheld if it bears a, ' * * * fair and substantial relationship' to legitimate state ends * * *".

See also Califano v. Webster, 430 US 313, 51 L Ed 2d 360, 97 S Ct 1192, upholding the constitutionality of the Social Security Act granting women reaching the age of 62 greater benefits than men of the same age having the same earning record.

Seduction is an ancient common-law action and is not based upon any statute granting only a right of action to women and prohibiting an action by men. Our research discloses no case in which an attack based on sex discrimination has been leveled against this ancient common-law action. There is no constitutional basis for Petitioner's claim.

Respectfully submitted,

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